The Timing of Judicial Review of Administrative Decisions: The Use and Abuse of Overlapping Doctrines

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I. Introduction

There are several gate-keeping devices by which a court may defer its examination of challenges to the action or inaction of administrative agencies. Central among such devices are the doctrines of exhaustion of administrative remedies, ripeness, and the requirement of final agency action.[1] These doctrines, as is discussed in detail throughout this Article, substantially overlap in untidy ways, generating great unpredictability in their application. It can be argued that such unpredictability is harmless[2] in that the same judicial result can be reached by employing each of the above doctrines according to taste.[3] More may be at stake, however, than mere jurisprudential fastidiousness. This Article will argue that the gate-keeping doctrines, such as exhaustion, ripeness, and finality, more strongly implicate constitutional considerations than is commonly recognized; that they implicate such constitutional concerns in more than just the Article III sense of the presence or absence of a requisite case or controversy; and that there is no guarantee that the gate-keeping doctrines are utterly fungible in these respects. While this Article will offer some suggestions aimed at clarifying the outlines of the gate-keeping doctrines, its major purpose

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1. Other inescapably related doctrines, such as that of primary jurisdiction, receive some scattered attention.

2. *See* 4 K. Davis, Administrative Law Treatise § 26.10, at 458 (2d ed. 1983).

3. Consider, for example, the common result reached by three utterly disparate means by the separate opinions of the three judge panel in *Ticor Title Ins. Co. v. F.T.C.*, 814 F.2d 731 (D.C. Cir. 1987), discussed in more detail in the concluding section below.

is to warn that the use of these doctrines may involve unrecognized constitutional stakes, particularly with respect to Article II executive branch functioning and the separation of powers, in general.

II. An Overview of the Overlap

Any overlap of the doctrines of exhaustion, ripeness, and finality stems primarily from their common focus on the timing of judicial action. It has been said that each of these doctrines has the effect of requiring the parties involved "to wait until an agency has completed all of the steps in the administrative process necessary to formulate, and sometimes to implement, a policy before any aspect of the agency's action can be subjected to judicial review."[4] The connection between each of these doctrines and the problem of the timing of judicial action is so close that some courts have been led to cultivate explicit ambiguity as to the meaning of "ripeness." One court has chosen to say that "[r]ipeness, when applied to administrative cases, is actually a generic concept dealing with the related doctrines of exhaustion of remedies, finality, and ripeness."[5] Regardless of whether this equivocation is worth the confusion it permits, it does at least illustrate that there is a broad sense of "ripeness" which is virtually synonymous with proper timing.

Pairwise comparisons of the gate-keeping doctrines do little to clarify their respective boundaries. To say, for example, that "[r]ipeness law tends to overlap with . . . exhaustion"[6] is to understate the matter. While unripeness and prematurity are virtually synonymous, prematurity and a failure to exhaust available administrative remedies have also been clearly and closely related.[7] Furthermore, exhaustion has been discussed as a condition, and perhaps under the circumstances a sufficient condition, for the ripeness for judicial review of an admin-

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4. R. PIERCE, S. SHAPIRO & P. VERKUIL, ADMINISTRATIVE LAW AND PROCESS § 5.7, at 180 (1985).

5. Dawson v. Cole, 485 So. 2d 1164, 1167 (Ala. Civ. App. 1986); *see also* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 395 (1965) (ripeness as "not so much a definable doctrine as . . . a group of related doctrines arising in diverse but analogically similar situations").

6. 4 K. DAVIS, *supra* note 2, at 350.

7. *See, e.g.*, County of Contra Costa v. State, 177 Cal. App. 3d 62, 73, 222 Cal. Rptr. 750, 761 (1986) ("A judicial action before the legislative process has been completed is premature and a court is without jurisdiction until administrative remedies have been exhausted.").

istrative decision.[8] Some attempt to differentiate ripeness and exhaustion has been made on the grounds that "the exhaustion doctrine focuses on procedure while the ripeness doctrine focuses on substance."[9] As will be shown below, however, ripeness often imports procedural concerns at least indirectly,[10] and the exhaustion doctrine often involves substantive considerations.[11]

Thus, the boundary between ripeness and exhaustion remains elusive.[12] Unfortunately, the boundary between exhaustion and finality is no more easily established. The requirement of exhaustion of administrative remedies has been said to be analogous to the requirement of finality for appellate review of lower court decisions.[13] Cases expressly decided on grounds of lack of a final agency order, but which were implicitly decided on grounds of lack of exhaustion, illustrate the substantial overlap of exhaustion and finality. The recent case of *Sierra Club v. N.R.C.*,[14] for example, expressly analyzed one of the issues

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8. *See* Schowengerdt v. General Dynamics Corp., 823 F.2d 1328, 1341 (9th Cir. 1987). It is not clear from *Schowengerdt* whether exhaustion was thought in this case to be a key to ripeness in a narrow, doctrinal sense, or ripeness in the "generic" sense of non-prematurity. One is inclined to assume the latter.

9. State v. Bowen, 813 F.2d 864, 870 (8th Cir. 1987) (citing 5 B. MEZINES, J. STEIN & J. GRAFF, ADMINISTRATIVE LAW § 48.01, at 48—3-4 (1985)). The reference to ripeness here is presumably to the non-generic sense.

10. For example, an issue may tend to be more suitable for judicial resolution if the issue has been raised, developed, and crystallized in a prior administrative proceeding. *See generally* Toilet Goods Ass'n v. Gardner, 387 U.S. 158, 875 S. Ct. 1520, 18 L. Ed. 2d 697 (1967).

11. For example, the exhaustion requirement is often waived on the basis of substantive considerations, such as the practical futility of such a resort to the agency procedures, or the threat of irreparable harm if the petitioner is required to exhaust administrative remedies. *See generally* McKart v. United States, 395 U.S. 185, 89 S. Ct. 1657, 23 L. Ed. 2d 194 (1969).

12. At one point, Professor Davis sought to distinguish the two doctrines by arguing that exhaustion applied in the context of agency adjudication, but that ripeness applied in the context of agency regulation and other administrative action not embodied in a regulation or final order. *See* Davis, *Administrative Law Doctrines of Exhaustion of Remedies, Ripeness for Review, and Primary Jurisdiction*, 28 TEX. L. REV. 168 (1949). This unduly rigorous attempt at compartmentalization has since been abandoned by Professor Davis. *See* 4 K. DAVIS, *supra* note 2, at 350. Professor Davis suggests that "the ripeness focus is on the types of functions that courts should perform, and the exhaustion focus is on the narrow question of how far a party must pursue an administrative remedy before going to court. . . ." *Id.* One element of the thesis of this Article is that cases in which the focus is on the exhaustion requirement may also, with respect to the exhaustion issue, require attention to the types of functions that courts should perform in a system of separated coordinate governmental powers.

13. *See* L. JAFFE, *supra* note 5, at 424.

14. 825 F.2d 1356 (9th Cir. 1987).

presented in terms of lack of a final agency order.[15] The underlying policy logic relied upon by the court in *Sierra Club*, however, could just as easily have suited a decision based on a failure to exhaust administrative remedies. The court observed that " '[j]udicial intervention in uncompleted administrative proceedings, absent a statutory mandate is strongly disfavored.' . . . We will not entertain a petition where pending administrative proceedings . . . might render the case moot and judicial review completely unnecessary."[16] This logic is, in part, the same as that of the doctrine of administrative exhaustion.[17]

More remarkably, both exhaustion and finality are treated as components or aspects of, or as one consideration bearing upon, the other doctrine. In *National Coalition Against the Misuse of Pesticides v. Thomas*,[18] the determination that the challenged agency orders were final was explicitly taken into consideration in the putatively broader inquiry as to whether exhaustion of administrative remedies should be required in the particular case.[19] Professor Davis has also referred to finality as a factor in making or accounting for a decision on whether exhaustion should be required.[20] On the other hand, at least in social security cases, a requirement of exhaustion of administrative remedies has been treated as merely one component of the putatively broader question of whether the statutory final decision requirement has been met.[21]

Perhaps the most noteworthy attempt to distinguish the roles of finality and exhaustion is that of Judge Leventhal in *Association of National Advertisers, Inc. v. F.T.C.*[22] Judge Leventhal's concurring opinion referred to finality and exhaustion as "analytically distinct"[23] and urged that "[o]ne requirement may be applicable even when the

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15. *Id.* at 1361-62.

16. *Id.* at 1362 (citing Bakersfield City School Dist. v. Boyer, 610 F.2d 621, 626 (9th Cir. 1979)).

17. *See* McKart v. United States, 395 U.S. 185, 89 S. Ct. 1657, 23 L. Ed. 2d 194 (1969) (contains an extensive policy discussion).

18. 809 F.2d 875 (D.C. Cir. 1987).

19. *Id.* at 879-80.

20. *See* Davis, *Administrative Law Doctrines*, *supra* note 12, at 169.

21. *See* Cassim v. Bowen, 824 F.2d 791, 794 (9th Cir. 1987) (citing 42 U.S.C. § 405(g) (1982)). The most authoritative case cited in this regard is the well-known case of *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976); see also *Luna v. Bowen*, 641 F. Supp. 1109, 1122 (D. Colo. 1986) (exhaustion as waivable element of statutory final decision requirement).

22. 627 F.2d 1151, 1177-78 (D.C. Cir. 1979) (Leventhal, J., concurring), *cert. denied*, 447 U.S. 921 (1980).

23. *Id.* at 1177 (Leventhal, J., concurring).

other is not."[24] In order to elucidate the distinction, though, Judge Leventhal observes that "the mere conduct of proceedings on a proposal of a rule, which may never be adopted or enforced, is not final action, and a court will not enjoin a rulemaking proceeding on a claim that the agency had no statutory or constitutional authority to promulgate the proposed rule."[25] What Judge Leventhal does not explain, however, is why this principle requires a finality analysis, over and above an exhaustion analysis. Under a rigorous exhaustion approach, a court could require a litigant to exhaust administrative proceedings even if the major issue was the agency's constitutional authority to conduct the proceeding in the first place.[26]

Finality similarly appears to merge with the ripeness doctrine. The law of finality and ripeness, which has been accurately characterized by then-Judge Scalia of the District of Columbia Circuit Court of Appeals as "complex,"[27] takes a part of its complexity from the substantial overlap of the concepts in practice. Occasionally, the terms are treated as virtually synonymous.[28] One commentator implicitly suggests that ripening is a process of which finality is an end state or result.[29] Commonly, though, cases refer to finality as one factor, if not the essential factor, in determining whether the case or issue is ripe for judicial review.[30] While it seems apparent that an agency action may be unripe for judicial review even though final, or sufficiently final,[31] the precise relationship between ripeness and finality is unsettled.[32]

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24. *Id.* (Leventhal, J., concurring).

25. *Id.* at 1178 (Leventhal, J., concurring).

26. See the opinion of Judge Edwards in *Ticor Title Ins. Co. v. F.T.C.*, 814 F.2d 731 (D.C. Cir. 1987) and *Rosenthal & Co. v. Bagley*, 581 F.2d 1258 (7th Cir. 1978).

27. Western Union Tel. Co. v. F.C.C., 773 F.2d 375, 378 (D.C. Cir. 1985).

28. *See* Ohio Citizens for Responsible Energy, Inc. v. N.R.C., 803 F.2d 258, 261 (6th Cir. 1986) (Jones, J., dissenting).

29. *See* B. SCHWARTZ, ADMINISTRATIVE LAW § 9.1, at 522 (2d ed. 1984).

30. *See, e.g.*, Consolidated Rail Corp. v. United States, 812 F.2d 1444, 1451 (3d Cir. 1987) (issue is fit for review if the agency resolution is "final" and the issue is "essentially legal"); Ciba-Geigy Corp. v. United States E.P.A., 801 F.2d 430, 435 (D.C. Cir. 1986) (above factors plus "whether consideration of that issue would benefit from a more concrete setting") (referring to finality as a matter of degree); Mid-Tex Elec. Coop., Inc. v. F.E.R.C., 773 F.2d 327, 337 (D.C. Cir. 1985) (asserting that "[t]he fitness requirement is essentially one of finality").

31. *See, e.g.*, Consolidated Coal Co. v. Federal Mine Safety & Health Review Comm'n., 824 F.2d 1071, 1081 (D.C. Cir. 1987); State Farm Mut. Auto Ins. Co. v. Dole, 802 F.2d 474, 479 (D.C. Cir. 1986) ("even when agency action is final and the issues presented are purely legal, a court may properly deem a matter unfit for resolution if postponing review would provide for a more efficient examination and disposition of the issues").

32. Compare the cases cited in note 30 among themselves and with the authorities cited in notes 28 and 29.

This conceptual comparison can be extended, with similarly murky results, even further. The relationship between the doctrines of exhaustion and primary jurisdiction is one of indistinct overlap and questionably-accurate formulae for differentiation. In this context, one court has gone so far as to suggest that "[f]or all practical purposes, there is no difference between requiring exhaustion of and requiring deferral to an administrative remedy."[33] Less strongly, it has been said that the doctrines of administrative exhaustion and primary jurisdiction serve similar purposes,[34] or merely that they are "conceptually analogous."[35]

In an effort to differentiate the two concepts, one court asserted that " '[t]he exhaustion principle divides largely into two doctrines, (1) exhaustion of administrative remedies and (2) primary jurisdiction.' "[36] This formulation states a useful and coherent view only if "exhaustion" is thought of in a generic and a more particular sense. Exhaustion in the generic sense would involve something like allowing or requiring either the commencement of, or continuation through, its useful course of an agency proceeding. Exhaustion in the more particular sense would be limited to something like not judicially interrupting an actual ongoing agency proceeding.

The case law and related literature substantially support a narrow conception of exhaustion in the particular sense, as long as the administrative proceedings are pending. One court has clearly specified that "exhaustion . . . contemplates a situation where some administrative action has begun, but has not yet been completed; where there is no administrative proceeding under way, the exhaustion doctrine has no application."[37] Despite the support for this approach,[38] it is far from clear that it accurately describes the actual

33. United States v. General Dynamics Corp., 813 F.2d 1441, 1450 n.12 (9th Cir. 1987) (adding that "[i]n either case there can be no litigation before the agency has acted").

34. *See* Abbott v. Burke, 100 N.J. 269, 495 A.2d 376, 392 n.5 (1985).

35. R. PIERCE, S. SHAPIRO & P. VERKUIL, *supra* note 4, at 206.

36. Zar v. South Dakota Bd. of Examiners of Psychologists, 376 N.W.2d 54, 55 (S.D. 1985) (quoting Gottschalk v. Hegg, 89 S.D. 89, 93, 228 N.W.2d 640, 642 (1975)).

37. Sharkey v. City of Stamford, 196 Conn. 253, 492 A.2d 171, 173 (1985) (distinguishing exhaustion from primary jurisdiction); *see also* Murphy v. Administrator of Div. of Personnel Admin., 377 Mass. 217, 386 N.E.2d 211, 214 (1979) (also distinguishing exhaustion from primary jurisdiction). Both *Murphy* and *Sharkey* refer to the underlying rationale for exhaustion and primary jurisdiction as being in substance much the same, based on orderly judicial review of decisions with the benefit of agency findings and conclusions.

38. *See, e.g.*, L. JAFFE, *supra* note 5, at 121; R. PIERCE, S. SHAPIRO & P. VERKUIL, *supra* note 4, at 485.

language of all of the cases. Whether used loosely or carefully, a number of cases employ the concept of an exhaustion requirement in referring to controversies in which no relevant administrative proceeding is currently under way, or has ever been begun.

To choose among recent, almost random examples, one might briefly consider *Sierra Club v. Union Oil Co.*[39] In this case, the court chose the rubric of failure to exhaust administrative remedies to refer to Union Oil's failure "to seek any type of administrative review"[40] of the terms of a permit issued by the California Water Review Board years before, given Union Oil's desire for a modification of the terms of the permit.[41] To similar effect, in a different context, the District of Columbia Circuit Court of Appeals used the rubric of failure to exhaust to refer to the National Resources Defense Council's failure to participate in the comment process in the underlying agency rulemaking proceedings that issued in the regulations in controversy.[42]

The notion of administrative exhaustion as including failure to commence administrative processes of redress similarly has some reasonably explicit support in the literature,[43] and is fairly implied by the logic of some of the most commonly made generalizations in the area of exhaustion. For example, it is said that as a general rule, whatever the exceptions, "[e]xhaustion of administrative remedies usually is not a condition precedent to suit under § 1983."[44] Whatever courts mean when they say this, it is not merely that a section 1983 plaintiff need not see through to completion any administrative proceeding he has in fact commenced or in which he has participated. Ultimately, then, any restriction of the scope of the exhaustion doctrine to cases of commenced, but allegedly insufficiently completed, administrative proceedings seems arbitrary.

One final attempt to differentiate exhaustion from primary jurisdiction should be noted. One commentator has suggested that "[t]he basic

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39. 813 F.2d 1480 (9th Cir. 1987).

40. *Id.* at 1486-87.

41. *Id.*

42. *See* National Resources Defense Council v. United States E.P.A., 804 F.2d 710, 714 (D.C. Cir. 1986) (per Bork, J.), *vacated*, 810 F.2d 270 (D.C. Cir. 1987).

43. *See* B. SCHWARTZ, *supra* note 29, § 8.34, at 512.

44. Lewis v. Meyer, 815 F.2d 43, 44 (7th Cir. 1987) (relying upon Patsy v. Board of Regents, 457 U.S. 496, 102 S. Ct. 2557, 73 L. Ed. 2d 172 (1982) (citing as an exception a provision of the Civil Rights of Institutionalized Persons Act)).

difference is that primary jurisdiction determines whether a court or an agency has *initial* jurisdiction; exhaustion determines whether *review* may be had of agency action that is not the last agency word in the matter."[45] Stated more concisely, "[t]he exhaustion doctrine prevents premature judicial interference with administrative proceedings, while the primary jurisdiction doctrine denies jurisdiction where agency proceedings have not yet begun."[46] While this view is coherent, it must be recognized that such language would be heavily qualified by the principle that the doctrine of primary jurisdiction of an agency does not operate to divest the court's subject matter jurisdiction over the case. The courts have recognized that " '[t]he doctrine of primary jurisdiction, despite what the term may imply, does not speak to the jurisdictional power of the federal courts.' "[47] It follows that " '[w]here the doctrine applies, jurisdiction is not thereby ousted, but only postponed.' "[48]

Thus, the cases and commentators have not clearly established the line of demarcation between exhaustion and primary jurisdiction any more than they have for the other pairs of concepts discussed above. The fact that such a remarkably untidy overlap and chronic lack of boundary clarity among all of the doctrines could persist is initially surprising. Courts and commentators take as their charge to reconcile and to clarify, in one fashion or another. It is a condition of vague and substantial doctrinal overlap and apparent doctrinal redundancy that appears unstable. The condition's persistence requires explanation, even if the disarray is utterly harmless and inconsequential. If the doctrinal untidiness discussed above were no more than that, and without practical significance, we would still expect the contours of the doctrines to be gradually clarified and distinguished, or for some concepts to fall into disuse as superfluous. Courts have an interest in doctrinal clarity and costless simplification of doctrine. If the doctrinal disarray is practically trivial, we would expect, at worst, that this gradual process of doctrinal clarification would proceed more slowly—or perhaps even more rapidly, in light of the presumed low stakes.

The explanation offered by this Article for this perpetual confusion is that the confusion in this area may in fact be useful to lawyers and

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45. B. SCHWARTZ, *supra* note 29, § 8.23, at 485.

46. *Id.* at 486 (emphasis in original).

47. United States v. Henri, 828 F.2d 526, 528 (9th Cir. 1987) (quoting United States v. Bessemer & Lake Erie R.R., 717 F.2d 593, 599 (D.C. Cir. 1983)).

48. *Id.* (quoting United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 353, 83 S. Ct. 1715, 1736, 10 L. Ed. 2d 915, 939 (1963)).

courts, at least in some cases. This usefulness may be enough to explain its persistence. Specifically, the Article suggests that confusion in the form of broad overlap of the doctrines allows for great flexibility or freedom in the theory of one's case or opinion. Even more specifically, it is widely thought, whether reasonable or not, that the doctrines of ripeness, exhaustion, finality, and primary jurisdiction differ in the degrees to which each implicates constitutional values. If the various doctrines are thought to differ in the degree to which they have constitutional status, and if they also substantially overlap, the possibilities for raising or avoiding constitutional concerns, according to one's interest or preferences, are enhanced. This process could be occurring, in a recognized or unrecognized way, regardless of whether the logic of the doctrines actually justifies finding them of differing constitutional status.

This is not to deny that there may be considerable confusion over whether, to what extent, or precisely how, doctrines such as ripeness implicate one or more constitutional concerns. In fact, a substantial amount of this type of confusion is present, as we shall see immediately below. There will still, however, tend to be cases in which a judge or lawyer likes, or dislikes, what he considers to be the constitutional component of one of the doctrines, or the absence of such a component, and chooses to couch his legal argument or opinion in terms of one of the doctrines rather than another precisely for that reason.

III. The Constitutional Dimensions of the Timing Doctrines

The courts and commentators are divided on the question of whether each of the doctrines has any significant constitutional component. It is a thesis of this essay that even when such constitutional components are recognized by the courts, part of the constitutional dimension is often missed. Specifically, even when the courts ascribe some constitutional content to the timing doctrines, it is usually in the nature of a case-or-controversy concern, rather than a separation of powers concern. In other words, when courts see a constitutional dimension, they too often focus on Article III concerns, when they should be equally concerned with agency powers under Article II. In extreme cases, the focus on Article III concerns may impair, at least indirectly, the Article I legislative authority of Congress.

Standard accounts of the doctrine of finality provide an example of this problem. One set of commentators has observed that while there are a variety of considerations underlying the finality doctrine, finality "may have a constitutional component, since there is no 'case' or

'controversy' within the court's decision making power under Article III until the agency has taken actions sufficient to create 'concrete adverseness' between it and the party seeking judicial review."[49] While these commentators do well to recognize the possibility of constitutional implications in a question of finality, it should be clear, at least in extreme cases, that ignoring the demands of finality may be thought to offend the separation of powers in general and judicial respect for executive branch functioning under Article II in particular. This need not invariably be a matter of a merely discretionary exercise of the court's authority to delay hearing a case for prudential reasons based in a judicial conception of sound policy. A finding of lack of finality may, in an extreme case, be fairly mandated by Article II. As the commentators quoted above recognize, the Supreme Court has required courts to respect agency autonomy in such crucial matters as setting their own agency priorities.[50] Beyond some point, judicial disregard for such considerations impairs agency functioning in a way violative of Article II.

The doctrine of primary jurisdiction is thought to have even less constitutional dimension than the doctrine of finality. Primary jurisdiction is thought of as a prudential, court-created doctrine that looks to the practical advantages and disadvantages of an initial recourse through an agency and its expertise, rather than through a court.[51] At some point, however, an Article II concern must arise, because one of the considerations thought to underlie the doctrine is whether allocating the matter at issue initially to the courts will adversely affect the agency's ability to carry out its congressional mandate by performing its regulatory responsibilities.[52] If this consequence impends from the court's initial adjudication of the matter, there is also a concern that the court is impinging upon the proper scope of congressional Article I authority. Congress may have intended no such arrangement and no such result on the theory that such would be inconsistent with its intended regulatory scheme.[53] It should be recognized, therefore, that there is a deeper constitutional mandate for applying the doctrine of primary jurisdiction in certain cases that extends beyond purely prag-

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49. R. PIERCE, S. SHAPIRO & P. VERKUIL, *supra* note 4, § 5.7.1, at 183.

50. *Id.* (citing Vermont Yankee Nuclear Power Corp. v. N.R.D.C., 435 U.S. 519, 544-45, 98 S. Ct. 1197, 1212, 55 L. Ed. 2d 460, 480 (1978)).

51. *Id.* at 206; B. SCHWARTZ, *supra* note 29, § 8.24, at 488.

52. *See* R. PIERCE, S. SHAPIRO & P. VERKUIL, *supra* note 4, § 5.8, at 206-07.

53. *See* United States v. General Dynamics Corp., 813 F.2d 1441, 1448 (9th Cir. 1987).

matic concerns over administrative expertise of non-constitutional elements of inter-branch coordination.[54]

A similar story could be told with regard to the doctrine of exhaustion. While opinions differ on the matter, it is often thought that the application of the exhaustion doctrine is, in the absence of a statute requiring exhaustion, a matter of the court's discretion to be reviewed only for abuse of discretion.[55] The underlying logic of the exhaustion requirement, however, may demand more. Under the appropriate circumstances, the failure to require exhaustion regarding an exception to the rule may amount to undue judicial interference with the work of the administrative agency.[56] Such concerns slide incrementally into deeper problems of "maintaining an efficient, independent administrative system. . . ."[57] In perhaps the leading exhaustion case, *McKart v. United States*,[58] the Supreme Court recognized the proper degree of executive branch and administrative agency autonomy as among the values or aims underlying the exhaustion requirement.[59] The intrusion upon the proper scope of autonomy of another governmental branch unavoidably risks action violative of the separation of powers. Whether liked or disliked, the administrative exhaustion requirement has a constitutional component, whether or not it derived its basis from a statute.[60]

This point is lost sight of not only from a failure to recognize the deeper implications of the logic of exhaustion, but also from an unduly narrow judicial focus, in some instances, on the perspective of the individual seeking a waiver of the exhaustion requirement. Admittedly, it is tempting to assume that because the law does not require the

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54. *Cf.* General Elec. Co. v. MV Nedlloyd, 817 F.2d 1022, 1026 (2d Cir. 1987) (principal reason for primary jurisdiction is to encourage interbranch coordination) (citing 3 K. DAVIS, ADMINISTRATIVE LAW § 19.01, at 5 (1958)).

55. *See, e.g.*, Park County Resource Council, Inc. v. U.S.D.A., 817 F.2d 609, 619 (10th Cir. 1987) (citing Rocky Mt. Oil & Gas Ass'n v. Watt, 696 F.2d 734, 743 n.12 (10th Cir. 1982)); Morrison-Knudsen Co. v. C.H.G. Int'l., Inc., 811 F.2d 1209, 1223 (9th Cir. 1987) (specifying no statutory exhaustion requirement). *But see* County of Contra Costa v. State, 177 Cal. App. 3d 62, 73, 222 Cal. Rptr. 750, 757 (1986) (doctrine of administrative exhaustion not a matter of judicial discretion).

56. *See* B. SCHWARTZ, *supra* note 29, § 8.30, at 503.

57. Morrison-Knudsen Co. v. C.H.G. Int'l, Inc., 811 F.2d 1209, 1223 (9th Cir. 1987).

58. 395 U.S. 185, 89 S. Ct. 1657, 23 L. Ed. 2d 194 (1969).

59. *Id.* at 193-94; *see also* L. JAFFE, *supra* note 5, at 425 ("exhaustion . . . is . . . an expression of executive and administrative autonomy").

60. *Cf.* Marathon Oil Co. v. United States, 807 F.2d 759, 768 (9th Cir. 1986) (recognizing that exhaustion issues may have a constitutional separation of powers component, but only in the case of statutorily imposed exhaustion requirements).

performance of a useless act, exhaustion should be waived or excused as futile if the plaintiff certainly, or even probably, will not prevail at the administrative level; for example, when the agency has routinely taken a position at odds with that for which the plaintiff would argue.[61] Probable futility from a claimant's standpoint, however, does not imply that requiring exhaustion would be practically pointless from the agency's standpoint or would serve only to delay relief. It is often overlooked that "the purposes underlying the exhaustion doctrine include the opportunity for the *agency* to exercise its discretion and expertise and the opportunity to make a record for the district court to review."[62]

Most courts would look with disfavor upon a claimant's argument that he should be permitted to bypass the decision stage and move to an immediate decision by a higher court based on the record, but absent any judgment, on the grounds that the trial court has consistently rejected the claimant's crucial legal argument and that waiting for a trial court judgment and opinion is pointless delay. Administrative agencies have similar interests. Even if the agency does not choose to reverse its established legal position in a given case, it may benefit from an opportunity to rethink or improve the rationale underlying that position. For the courts to ignore such considerations by waiving exhaustion based merely on a showing by the plaintiff of probable futility from the plaintiff's own standpoint is to risk seriously intruding on proper agency functioning in ways that are ultimately barred by considerations of the constitutional separation of powers.

The claim that each of the timing doctrines has a constitutional component, and in particular a separation of powers component, is perhaps most controversial in the case of the doctrine of ripeness. It is frequently denied that ripeness has, or should have, any constitutional component, and those who acknowledge some such constitutional element of ripeness too often focus excessively on Article III case or controversy issues, to the neglect of Article II separation of powers concerns.

The cases and commentary on ripeness tend to veer from the proper path in drawing too much from the dangerous notion that ripeness is merely a judicially created limitation on the availability of judicial

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61. *See* B. SCHWARTZ, *supra* note 29, § 8.31, at 505-06 (citing Wolff v. Selective Serv. Local Bd., 372 F.2d 817 (2d Cir. 1967)).

62. United States v. Steele (*In re* Steele), 799 F.2d 461, 466 (9th Cir. 1986) (emphasis in the original).

review.[63] Even if ripeness is thought of as judicially created, this should not imply that ripeness is simply a contingent, prudential, and, therefore, non-constitutionally required doctrine. Yet some courts have taken the extra step of finding ripeness to be a matter of prudence and non-constitutional pragmatism,[64] and supplementing the substantial support among the commentators for this view.[65] This may also reflect inadequate appreciation for the possibility that even a very "pragmatic"[66] inquiry into ripeness may result in conclusions that deeply and directly implicate constitutional values.

Of course, not all courts and commentators have declined to recognize or approve of the constitutional status of ripeness. The issue is sometimes simply held open,[67] or ripeness is referred to, with qualification, as "largely" prudential,[68] or as a doctrine that "overlaps at its borders" with the case or controversy requirements of Article III.[69] Some cases suggest that the relationship between ripeness and Article

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63. *See* R. PIERCE, S. SHAPIRO & P. VERKUIL, *supra* note 4, § 57.4, at 196 (citing the leading case of Abbott Laboratories v. Gardner, 387 U.S. 136, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967)).

64. *See, e.g.*, American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 327 (7th Cir. 1985), *aff'd per curiam*, 475 U.S. 1001 (1986) ("[r]ipeness is a prudential question"). Remarkably, Judge Easterbrook relies in part on a Supreme Court case that states the issue as whether the plaintiffs' claims "demonstrate sufficient ripeness to establish a concrete case or controversy." Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 579, 105 S. Ct. 3325, 3332, 87 L. Ed. 2d 409, 418 (1985). The existence of a case or controversy is plainly a matter of minimum Article III requirements. It should be noted that as the Seventh Circuit in *Hudnut* found the plaintiff's claims to be prudentially ripe, the court was logically required to consider whether the claims were unripe in any constitutional sense. *Hudnut*, 771 F.2d at 327.

65. *See, e.g.*, Vining, *Direct Judicial Review and the Doctrine of Ripeness in Administrative Law*, 69 MICH. L. REV. 1443, 1516 (1971) ("[u]nlike 'finality', . . . the term 'ripeness' does not have statutory status, and the Court is not therefore constitutionally bound to find work for it to do"). On this Article's analysis, of course, the document that constitutionally binds the Court to find work for ripeness is the Constitution itself. For an extended criticism of a perceived judicial tendency to "constitutionalize" ripeness, see Nichol, *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153 (1987).

66. *See, e.g.*, Sierra Club v. Penfold, 659 F. Supp. 965, 970 (D. Alaska 1987) (a pragmatic ripeness analysis).

67. *See, e.g.*, Office of Communication of United Church of Christ v. F.C.C., 826 F.2d 101, 104 n.2 (D.C. Cir. 1987) ("we need not address here whether . . . lack of ripeness here implicates article III"); American Trucking Ass'ns, Inc. v. I.C.C., 747 F.2d 787, 789 (D.C. Cir. 1984) (raising the possibility, but not deciding, that ripeness may to some extent implicate the case or controversy requirement).

68. Eagle-Picher Indus. v. E.P.A., 759 F.2d 905, 912 (D.C. Cir. 1985).

69. *Id.* at 915; Consolidation Coal Co. v. Federal Mine Safety & Health Review Comm'n, 824 F.2d 1071, 1077 n.6 (D.C. Cir. 1987).

III may be fairly characterized as more than a marginal overlap.[70]

The logic of the courts that have implicitly, if not explicitly, recognized an Article III constitutional dimension of ripeness is relatively straightforward. The doctrine of ripeness operates to prevent the abstract adjudication of disputes lacking minimal concreteness and definiteness.[71] Issues that are legally ripe for definitive judicial resolution have, therefore, been contrasted with the hypothetical and speculative bases for issuing an advisory opinion.[72] More broadly, a violation of the ripeness doctrine tends to turn the function of judicial review into what might be called "judicial preview,"[73] and the " '[n]o roving preview function has been assigned to courts in the federal system.' "[74]

Finally, courts occasionally have explicitly or, more frequently, implicitly drawn upon Article II constitutional concerns in defining the scope of the exhaustion doctrine. The Supreme Court's recognition that the ripeness doctrine serves "to protect the agencies from judicial interference"[75] qualifies as this sort of implicit recognition. It is occasionally explicitly inferred from the judicial interference analysis that ripeness has both an Article II and an Article III constitutional component.[76] The fact that ripeness has an Article II component is inescapable, because it is dictated by the logic of the purposes discussed above as underlying the doctrine of ripeness itself. This is insufficiently appreciated, even by those commentators who explicitly link ripeness to the separation of powers.[77]

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70. *See, e.g.*, South Carolina Elec. & Gas Co. v. I.C.C., 734 F.2d 1541, 1545 (D.C. Cir. 1984); Air New Zealand Ltd. v. Civil Aeronautics Bd., 726 F.2d 832, 835 (D.C. Cir. 1984) (per Scalia, J.) (concluding that "ripeness is an important element of our judicial tradition, and indeed—in some applications at least—of the 'case or controversy' requirement of the Constitution itself").

71. *See* Northern Alaska Envtl. Center v. Hodel, 803 F.2d 466, 470 (9th Cir. 1986).

72. *See* Patterson v. County of Tehama, 190 Cal. App. 3d 1298, 235 Cal. Rptr. 867, 874 (1987) (review denied and ordered not to be officially published June 25, 1987).

73. Northern Natural Gas Div. of Internorth v. F.E.R.C., 780 F.2d 59, 63 (D.C. Cir. 1985) (quoting Tennessee Gas Pipeline Co. v. F.E.R.C., 736 F.2d 747, 751 (D.C. Cir. 1984)).

74. *Id.*

75. Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49, 87 S. Ct. 1507, 1515, 18 L. Ed. 2d 681, 691 (1967); *see also* Associated Gas Distribs. v. F.E.R.C., 824 F.2d 981, 1031 (D.C. Cir. 1987) (quoting the relevant language from *Abbott Laboratories*).

76. *See* State Farm Mut. Auto. Ins. Co. v. Dole, 802 F.2d 474, 479 (D.C. Cir. 1986).

77. *See* Floyd, *The Justiciability Decisions of the Burger Court*, 60 NOTRE DAME

Those commentators who would deny even Article III constitutional content to ripeness[78] focus on the doctrine's pragmatic, often prudential character, its flexibility, and its sensitivity to particular case circumstances, as well as the availability of justiciability doctrines such as standing to do the more clearly constitutional work.[79] This approach, however, assumes a greater degree of choice in the matter than the logic of the concepts will allow. Ripeness simply and unavoidably implicates constitutional concerns both significantly and directly, as do each of the other timing-device doctrines discussed in this article. One leading critic of ripeness as a "constitutionalized" doctrine has recognized that "[t]he ripeness barrier thus allows federal courts to give due respect to the scope of responsibilities allocated to other government decisionmakers."[80] This function is neither invariably and completely prudential, nor always satisfactorily fulfilled by doctrines such as standing. In separation of powers terms, for example, it is plain that what was unconstitutional about President Truman's seizure of the steel mills was precisely his failure to give due respect to the scope of responsibilities allocated to Congress, a co-equal governmental decisionmaker.[81] We can remove the constitutional content from the ripeness doctrine only at the price of significantly impairing the constitutional values we seek to preserve.[82]

In sum, each of the timing doctrines discussed in this essay unavoidably retains some constitutional content. Further, the constitutional

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L. REV. 862, 931 (1985) (linking ripeness to the separation of powers, but limiting its attention to the function of ripeness in ensuring that courts do not adjudicate mere "generalized grievances," as opposed to a concern for unimpaired executive branch agency functioning).

78. *See, e.g.*, Nichol, *Injury and the Disintegration of Article III*, 74 CALIF. L. REV. 1915, 1915 (1986) ("[T]he Supreme Court has attempted to pour content into article III by constitutionalizing . . . ripeness."); Vining, *supra* note 65, at 1509, 1516; Nichol, *supra* note 65, at 153.

79. *See* Nichol, *supra* note 65, at 155-56.

80. *Id.* at 178.

81. *See generally* Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 72 S. Ct. 863, 96 L. Ed. 1153 (1952).

82. Then-Judge Antonin Scalia observed that "[t]he degree to which the courts become converted into political forums depends not merely upon what issues they are permitted to address, but also upon *when* and *at whose instance* they are permitted to address them." Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. Rev. 881, 892 (1983) (emphasis in the original). A fair inference from this observation is that the various timing doctrines, or the "when," is no less a part of the separation of powers than the "who," or the standing question. What the courts and commentators have failed to supply is "a rigorous and explicit theory" as to why this should be so. *See* Vander Jagt v. O'Neill, 699 F.2d 1166, 1177, 1178-79 (D.C. Cir. 1983) (Bork, J., concurring).

content of each of the doctrines partakes at least as much of Article II and minimally unimpaired executive branch functioning as of the Article III case or controversy requirement. It is not surprising, in view of the obvious mutual overlap of the doctrines, that in certain circumstances each doctrine retains some constitutional element of roughly equal degree. One explanation for why this overlap has not been adequately recognized may be the occasional utility to courts and litigators of concluding or arguing that a given claim does or does not rise to constitutional dimension. If it becomes plausible to argue that one or more of the timing doctrines has a lesser constitutional dimension than the others, perhaps due to its judge-created or allegedly more prudential character, that argument will be made by the litigant in whose interest it is to do so, and, in a given instance, may be adopted and perpetuated by the court. The present state of confusion, and of widespread belief that some of the timing doctrines have some minimal constitutional content, is also one of great flexibility.

IV. *Ticor* and the Fragmentation of the Law

The recent District of Columbia Circuit Court of Appeals case of *Ticor Title Insurance Co. v. F.T.C.*[83] deserves some consideration in its own right as the case that most dramatically illustrates the nearly complete breakdown of the predictable utility of the various timing doctrines in the administrative context. The crucial substantive issue posed in *Ticor* was the constitutionality, under Article II, of the broad exercise of executive authority by the so-called independent agencies not directly subject to presidential control.[84] The District of Columbia Circuit was unanimous in declining to reach the merits. The court's unanimity dissolved, however, on the question of the most appropriate general rationale for staying its judicial hand. The panel, consisting of Circuit Judges Edwards and Williams and District Judge Joyce Hens Green, sitting by designation, essentially ventured off in three separate directions, thereby confirming Judge Green's reference to "the confused and often contradictory nature of the law of this circuit concerning the related doctrines of finality, exhaustion, and ripeness."[85] Judge Edwards' line of analysis focused on exhaustion to the exclusion of ripeness and finality.[86] Judge Williams, in contrast, preferred the use

83. 814 F.2d 731 (D.C. Cir. 1987).
84. *See id.* at 732.
85. *Id.* at 750 (opinion of Green, J.).
86. *See id.* at 736 (opinion of Edwards, J.).

of the finality doctrine, as opposed to exhaustion or ripeness.[87] Judge Green completed the analytical triad by concluding that "the ripeness doctrine provides the soundest basis for the result we reach today."[88]

This Article will not endeavor to chase down the detailed logic of any of the opinions in *Ticor*, because some of the arguments focus principally on the narrow issue of attempting to reconcile prior District of Columbia Circuit Court of Appeals opinions and because some are adapted to the particular procedural context of the *Ticor* case itself. However, some general observations can be made. First, it seems clear that the right general result was reached, especially in view of the assertion by *Ticor* of certain non-constitutional defenses to the Federal Trade Commision complaint[89] on which *Ticor* might prevail, thereby avoiding the necessity of deciding the monumental constitutional issue of the legitimacy of independent agencies.[90]

Whether this result is constitutionally compelled, however, is open to serious doubt. Regardless of whether we adopt a rule waiving a statutory or non-statutory exhaustion requirement for cases involving a facial constitutional challenge to the agency's underlying authority,[91] it would be difficult to detect a genuine violation of Article II or Article III in the court's deciding *Ticor* on the merits without the

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87. *See id.* at 746, 750 (opinion of Williams, J.).

88. *Id.* at 750 (opinion of Green, J.).

89. *Id.* at 732 (opinion of Edwards, J.).

90. *Cf.* Doe v. Weinberger, 820 F.2d 1275, 1283 (D.C. Cir. 1987) (refusing to reach constitutional issue of legitimacy of statutory exclusion of judicial review in light of possibility that exhaustion of administrative remedies may make such issues moot); Dhangu v. I.N.S., 812 F.2d 455, 460 (9th Cir. 1987) (declining to reach constitutional issue in view of possibility that administrative exhaustion may make such issues moot).

91. *See* Northwestern Indiana Tel. Co. v. F.C.C., 824 F.2d 1205, 1210 n.8 (D.C. Cir. 1987) (constitutional nature of claimant's challenge to agency regulation does not "entitle a party to bypass statutory exhaustion requirements"). *Compare* Andrade v. Lauer, 729 F.2d 1475, 1491 (D.C. Cir. 1984) (agency without power or authority to decide the constitutional issue raised and without relevant expertise to assist the court) *and* Walker v. State Bd. of Elections, 65 Ill. 2d 543, 359 N.E.2d 113 (1976) (distinction drawn between facial and as-applied constitutional challenges to statutes in exhaustion context) *and* B. SCHWARTZ, *supra* note 29, § 8.37, at 518 (where there is a facial constitutional challenge, "the administrative process is unlikely to contribute anything to the resolution of the challenge") *with* Lively v. Bowen, 827 F.2d 268, 269-70 (8th Cir. 1987) (constitutional issue raised must not be clearly without merit) *and* Dawson v. Cole, 485 So. 2d 1164, 1167 (Ala. Civ. App. 1986) ("[T]he mere allegation of a [facial] constitutional issue is not sufficient to make the general rule of exhaustion inapplicable" in light of considerations of judicial and administrative economy.) *and* Abbott v. Burke, 100 N.J. 269, 495 A.2d 376, 392 (1985) (even some constitutional challenges may require factual development at the administrative proceeding level).

benefit of agency insight on the underlying independent agency authority issue. The monumental underlying constitutional issue with respect to the broad range of independent agency powers obviously transcends the purview of the Federal Trade Commision or any other agency. In addition, it is doubtful that the agency can intelligently contribute much to the resolution of this broad issue that cannot be conveyed if the administrative exhaustion requirement is bypassed. Nor are we comforted if the Federal Trade Commission solemnly announces that, based on the hearing and briefs, it is satisfied that *Ticor*'s broad underlying constitutional challenge is unconvincing.

Even if *Ticor* had not raised non-constitutional defenses, the administrative-level success of which might render moot its monumental constitutional challenge, the case would still be rightly decided, if on prudential, as opposed to constitutional, grounds. Even if we assume that the underlying facial constitutional challenge will one day be resolved by the Supreme Court, and that the agency's detailed factual development of any particular challenge will not shed much light on that broad issue, we still have reason to encourage courts to stay their hand until absolutely necessary. A delay of even a year or two in resolving a monumentally complex constitutional issue, with all sorts of dimly foreseeable consequences of varying severity, may well serve to allow additional informal analysis, reflection, and debate among scholars, judges, and agency officials. With the stakes as high as they are in these matters, an extra year or two of additional evidence or discussion seems well worth buying at the expense of *Ticor* having to route its cause through the administrative process.

In *Ticor* itself, Judge Edwards opted for an exhaustion, as opposed to a ripeness, analysis based in part on his explicit contrast between the two doctrines:

> The exhaustion doctrine emphasizes the position of the party seeking review; in essence, it asks whether he may be attempting to short circuit the administrative process or whether he has been reasonably diligent in protecting his own interests. Ripeness, by contrast, is concerned primarily with the institutional relationships between courts and agencies, and the competence of the courts to resolve disputes without further administrative refinement of the issues. In extreme cases, the ripeness doctrine serves to implement the policy behind Article III of the Constitution.[92]

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92. *Ticor*, 814 F.2d at 735 (opinion of Edwards, J.) (quoting E. GELLHORN & B. BOYER, ADMINISTRATIVE LAW AND PROCESS 316-19 (1981)).

Of course, to claim that the difference between exhaustion and ripeness is a matter of emphasis is not to make a dramatic claim, but even this claim is perhaps doubtful. One might as well say that exhaustion, as much as ripeness, concerns itself with the relations between courts and agencies as institutions. The quoted distinction recognizes a limited Article III component of ripeness, but, at least by implication, fails to recognize an Article II component of ripeness, or a constitutional element, even in extreme cases, for the doctrine of exhaustion.

Judge Williams' opinion adopted finality as the appropriate rubric to decide the case on the grounds that finality was a statutory jurisdictional prerequisite to review,[93] whereas "exhaustion and ripeness are judge-made *prudential* doctrines. . . ."[94] This view is, at best, controversial and dubious on the merits.[95] Judge Williams' own opinion recognizes that exhaustion and ripeness, as well as finality, "serve the interests in agency autonomy."[96] Beyond some point, judicial intrusion on or impairment of executive branch "autonomy" involves a violation of Article II.

To complete the contrast, Judge Green's opinion urged that "the ripeness doctrine presents the only bar to immediate judicial consideration of appellants' claims, as the policies and purposes underlying the finality and exhaustion requirements do not dictate further postponement of judicial review."[97] The judge's conclusion that the exhaustion doctrine could not be utilized to bar immediate judicial entertainment of the *Ticor* challenge was flawed on two grounds. First, while it was true that exhaustion was futile in the sense that the Federal Trade Commission was unlikely to disavow its prosecutorial authority on constitutional grounds,[98] exhaustion was not necessarily futile in the crucial sense that *Ticor* might well prevail at the agency level on one or more of the non-constitutional grounds raised,[99] thus making moot the broad constitutional issue. Second, Judge Green's opinion emphasized the public interest in resolving the broad constitutional claims of ongoing unconstitutional activities of the independent agen-

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93. *Id.* at 745 (opinion of Williams, J.).
94. *Id.* at 746 (opinion of Williams, J.) (emphasis in the original).
95. *See supra* notes 55-62 and accompanying text (exhaustion), notes 64-92 and accompanying text (ripeness).
96. *Ticor*, 814 F.2d at 745 (opinion of Williams, J.).
97. *Id.* at 751 (opinion of Green, J.).
98. *Id.* at 752 (opinion of Green, J.).
99. *See id.* at 732 (opinion of Edwards, J.).

cies.[100] The opinion, however, gave apparently no weight to the public interest in having those monumental constitutional issues resolved only after opportunity for the fullest reasonable examination, inquiry, discussion and debate among all interested persons is made available. This interest is hardly served by bypassing the agency process.

According to Judge Green, ripeness was the appropriate doctrine to avoid immediate judicial intervention on the ground that avoiding a finding of unripeness, in contrast to the failure to exhaust, "always requires some showing of hardship."[101] This analysis is, itself, controversial, particularly in the District of Columbia Circuit. While some support for the view that ripeness requires a showing of hardship beyond proving that the issues presented are minimally crystallized, developed, and suitable for judicial resolution exists,[102] there is also support for the view that if a claimant can show that the issues are fit for judicial resolution, no extraordinary or special showing of hardship to the claimant, if judicial resolution is delayed, is required.[103] Judge Green's rationale for requiring an independent hardship analysis focused on the concern that a contrary rule "would make agencies but a poor relation of the courts, reducing their function in many instances to the mere collection of data and refinement of issues for judicial resolution."[104] This observation, of course, reinforces the Article II component of ripeness which this Article has found to be shared with the other timing doctrines.[105]

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100. *Id.* at 754 (opinion of Green, J.).

101. *Id.* at 755 (opinion of Green, J.).

102. *See* Consolidation Coal Co. v. Federal Mine Safety & Health Review Comm'n, 824 F.2d 1071, 1094-96 (D.C. Cir. 1987) (D.H. Ginsburg, J., dissenting) (citing Abbott Laboratories v. Gardner, 387 U.S. 136, 149, 87 S. Ct. 1507, 1515, 18 L. Ed. 2d 681, 691 (1967)).

103. *See* Office of Communication of United Church of Christ v. F.C.C., 826 F.2d 101, 110-11 (D.C. Cir. 1987) (Wald, C.J., dissenting) (citing Eagle-Picher Indus., Inc. v. E.P.A., 759 F.2d 905, 918 (D.C. Cir. 1985)); Consolidation Coal Co. v. Federal Mine Safety & Health Review Comm'n, 824 F.2d 1071, 1088-89 (D.C. Cir. 1987) (Edwards, J., concurring); *cf. Office of Communication of United Church of Christ*, 826 F.2d at 108 n.6 (per Bork, J.) ("We express no opinion on the extent to which ripeness analysis requires the court to balance the fitness of the issues against the hardship to the parties.").

104. *Ticor*, 814 F.2d at 756 (opinion of Green, J.).

105. *Id.* Judge Green rejected Judge Williams' finality analysis on the grounds that "finality is a *flexible* and *pragmatic* concept." *Id.* (opinion of Green, J.) (emphasis in original). One of the lessons of this Article, of course, has been that ripeness and exhaustion, certainly no less than a statutory and apparently jurisdictional finality requirement, may be thought of as flexible and pragmatic concepts, a fact that does not bear conclusively on the nature or degree of any constitutional component of the doctrines.